for The Defense

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The Training Newsletter for the Maricopa County Public Defender's Office ⋈ Dean Trebesch, Maricopa County Public Defender

CONTENTS:

CLOSING THE DOOR: Surviving "Invited Error "

By Donna Lee Elm
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It has happened (or will) to you. Faced with a particularly nasty piece of evidence, you strategized ways to keep it out of trial. After successfully getting it precluded *in limine*, you thoroughly prepared witnesses and carefully drafted examinations to steer clear of dangerous waters. Then right after you finish direct of your client, the prosecutor drags you over to the bench and whispers, "He's opened the door now." The judge solemnly nods in unison with the prosecutor. A knot tightens in your gut. Been there?

All is not lost. Did you really open the door? To what cross-examination? How far can the prosecutor go? You may be able to close that door -- all or in large part.

The predicament, metaphorically referred to as "opening the door," actually has the lofty title of "doctrine of invited error" in Arizona practice, or "of curative admissibility" in some other jurisdictions. *State v. Kemp*, 185 Ariz. 52, 60-61, 912 P.2d 1281, 1289-90 (1996); *Lampkins v. United States*, 515 A.2d 428, 430 (D.C.App. 1986). The doctrine states: "Where one party injects improper or irrelevant evidence or argument, the 'door is open,' and the other party may have a right to retaliate by responding with comments or evidence on the same subject." *Pool v. Superior Court*, 139 Ariz. 98, 103, 677 P.2d 261, 266 (1984). In short: "A party cannot complain about a result he caused"-- even if the resulting evidence was error. Udall, *Law of Evidence* §11 at 11 (3rd ed. 1991). But, there are a number of limitations to this doctrine.

Was a Door Really Opened?

The prosecution can only walk through a door if it was really opened; if there is no defense error inviting rebuttal, the state cannot retaliate. A substantial amount of case law disapproves a prosecutor's rash questioning when he mistakenly *presumed* a door had been opened. For instance in *State v. Brazeal*, 99 Ariz. 249, 251, 408 P.2d 215, 217 (1965), the defense was well within its right to ask in closing statement where certain evidence was that a state's witness had testified about. Since that argument was not improper, it did not open the door for the prosecutor to tell the jury that the evidence did exist and where it was, when *that* was never in evidence. Additionally in *State v. Rios*, 122 Ariz. 33, 37, 592 P.2d

(cont. on pg. 2) ☞

1299, 1302 (App.), *rev. denied* (1979), the defendant had invoked his Miranda rights. Defense counsel did nothing improper in asking the client whether he had admitted anything to the officer. Hence, the defense had not opened the door to the prosecutor's subsequent impeachment eliciting the invocation.

In a related vein, the State may not anticipate a defense strategy and preemptively strike to counter it, especially when the prosecutor was wrong about where the defense was going. In *State v. Hicks*, 133 Ariz. 64, 68, 649 P.2d 267, 271 (1982), though self-defense was clearly not the claim, the prosecutor thought so after counsel mentioned in passing in opening statement that the victim was a loudmouth, obnoxious, cutting-type person. Nonetheless, the defense never admitted such evidence at trial. The state's subsequent introduction of evidence of the victim's peacefulness had not been invited.

" There is also a rule that when a witness blurts out something nonresponsive to defense questioning, which seemingly opens a door, that cannot be held against the defendant, so it does not allow the prosecution to walk through."

Who Opened the Door?

The prosecution can only walk through a door if the defense opened it, and only if the defense *invited* that error. They cannot open a door themselves then proceed through. In *People v. Gomez*, 642 N.Y.S.2d 273 (Sup.Ct. 1996), the fact that the defendant had sold drugs to support himself had been precluded. Nonetheless, the prosecutor asked the defendant whether he was selling drugs to make money. Confused, the defendant denied it, and the prosecutor impeached him with all his sales history. The prosecutor claimed the defendant had invited that error by lying. The Court indicated that that would have been permissible if the *defense* had elicited the original testimony, but not when the state had. "The tactic of eliciting a denial by a defendant of some statement not properly presented in the state's case-in-chief does not serve, generally, to inject an issue into the case which may then be rebutted by the State." *State v. Johnson*, 145 Ariz. 482, 484, 702 P.2d 711, 713 (App. 1985). Of course, without an immediate defense objection, there may be danger of waiving the issue. *See State v. Tovar*, 187 Ariz. 391, 393, 930 P.2d 468, 470 (App. 1996), *rev. denied* (1997).

There is also a rule that when a witness blurts out something nonresponsive to defense questioning, which seemingly opens a door, that cannot be held against the defendant, so it does not allow the prosecution to walk through. In *State v. Ikirt*, 160 Ariz. 113, 114-15, 770 P.2d 1159, 1160-61 (1989), a witness's offer to take a lie detector had been precluded. However, when defense counsel asked whether that witness recalled if Mr. Kellogg had been interested in getting information to convict Ikirt, the witness replied affirmatively, adding that he had offered to take a polygraph. The Court concluded that the gratuitous statement "was not responsive to the question asked by defense counsel, and thus is not a true case of invited error." Similarly, in *Pickett v. State*, 456 So.2d 330, 338 (Ala.App. 1982), the defense asked for reputation (of truthfulness) evidence but was rewarded with opinion evidence. Because counsel "asks a perfectly proper question but his witness gives an irresponsive answer containing illegal or inadmissible matter," the doctrine of invited error does not apply. *Id.*

Did the Prosecution Go Through the Wrong Door?

Sometimes the defense did open a door, but the prosecutor went into an unrelated area: he walked through the wrong door. In *State v. Duzan*, 176 Ariz. 463, 465, 862 P.2d 223, 225 (App.), *rev. denied* (1993), the court precluded the defense from introducing complaints that the victim sexually harassed and had affairs with employees. The victim did not discuss the affairs at all during direct, but did testify that he had his business to provide for his family. That did open a door, but only as to whether proceeds were being used to support his family. It did *not* open the door to inquiries suggesting that the victim had the business to provide "a steady stream of female companionship," nor to thus introducing the precluded

(cont. on pg. 3) ☞

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matters. In *Kemp*, *supra*, a witness's statement that Kemp had had the gun had been suppressed. When the defense crossed the detective that "there is *no evidence* that Kemp had possession of the gun ...," he opened the door to rebuttal as to that statement, but not to that witness's statement that Kemp shot the victim.

Was the Door Only Opened a Crack?

The principle is that if you open the door just a little, to only one small piece of evidence, then the State can only rebut that evidence and cannot run amok through every horrible thing your client ever did. You "invited error" only as to a limited topic, "only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the unfair evidence." *Lampkins*, *supra* at 430. *Kemp*, *supra*, could also be interpreted as the defense opened the door to statements he possessed the gun, but that did not allow the State to introduce the rest of the suppressed statements.

In *Sneed v. State*, 14 P.2d 248, 249 (Ariz. 1932), prior sexual misconduct with the victim had been precluded. The defense crossed her on bias, eliciting that she felt the defendant "had ruined her life." The State could redirect on those feelings, but the door had not been flung open to permit cross on *why* she felt that way, on what he had done to her before. In *State v. Spencer*, 683 So.2d 1326, 1333 (La.App. 1996), Spencer had been in custody on numerous charges and a probation violation, which were all inadmissible. On cross, the defendant said that he had "been in jail the last year on this charge." That opened the door to how long he had been there, but not to the following inquiries that "You got your probation revoked too, right?" and "and because of other charges?"

" The principle is that if you open the door just a little, to only one small piece of evidence, then the State can only rebut that evidence and cannot run amok through every horrible thing your client ever did."

How Long Can the State Keep the Door Open?

Invited error is, after all, error. So, even if you invite error allowing the State to retaliate, they cannot overdo it. "Whenever a defendant 'opens the door,' the State may walk through it, but it is not necessarily a license to exploit defense counsel's inattention, omission, or mistake by repeatedly referring to prejudicial comments." *State v. Diaz*, 635 So.2d 499, 507 (La.App. 1994). The prosecution is free to retaliate, but he cannot repeatedly inject his rebuttal into the trial after first introducing it. *State v. Smith*, 418 So.2d 534, 537 (La. 1982).

Can the Door Be Shut Before the Prosecutor Walks Through It?

It can, but only in a few circumstances. Some error is *so bad* that, even if you open the door, the prosecutor cannot go through it. For instance, prior allegations which were not true would not be proper impeachment. In *State v. Saenz*, 98 Ariz. 181, 403 P.2d 862 (1963) and *State v. Smith*, 96 Ariz. 150, 393 p.2d 251 (1964)(both when Rule 404 permitted prior bad acts if sustained by convictions), even if the defense opened the door to those bad acts, the State could not impeach with them since there had been no conviction.

Similarly, evidence which would be incompetent (such as polygraph results, hypnotically-enhanced testimony, complete speculation) would not be admissible even if the door had been opened to it. In a child molest case, *State v. Lindsey*, 149 Ariz. 472, 475-76, 720 P.2d 73, 76-77 (1986), the State called an expert to discuss typical child sexual abuse behavior. The State also, over objection, got in opinion testimony that only a very small percentage of incest victims fabricate it. The defense attempted to cross on that, and then the State brought in further such testimony including specific opinions as to credibility. Because opinion of a witness's credibility is *never* properly admitted, it cannot come in even if a door were opened. Also in a different *Smith* case, the defense argued in closing that there are a number of legitimate reasons why a defendant would not take the stand. The State then replied that a defendant would avoid the stand due to admission of his priors (something which had not come out at trial). While the doctrine of invited error would permit some response, the prosecutor's remarks suggested that the defendant had a past he was hiding from the jury (in derogation of his privilege against self-incrimination), so was improper. *State v. Smith*, 101 Ariz. 407, 408-09, 420 P.2d 278, 279-80 (1966).

Some courts conduct a weighing when the statement that opened the door was truly insignificant but the rebuttal would be extremely prejudicial. *E.g.*, *State v. Cook*, 172 Ariz. 122, 125, 834 P.2d 1267, 1270 (App. 1992); *Spencer*, *supra* at 1332. The rule is that "invited errors will not normally be grounds for reversals, 'unless they go beyond a pertinent reply *or are necessarily prejudicial.*'" *State v. Gortarez*, 98 Ariz. 160, 402 P.2d 992 (1965)(emphasis supplied). Moreover, "When constitutional rights are involved, ... 'the court must be particularly clear that the case is appropriate for curative

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admissibility ... [by requiring a] clear showing of prejudice before the open-the-door rule of rebuttal may be involved.'" *Lampkins, supra*. This is a fruitful area for creative argument, applying standard Rule 403 analysis.

Conclusion

The best laid plans of mice and men sometimes go awry. But when you face a claim that you opened the door, there is still a great deal that you can do to overcome or severely limit it. ■

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1. I acknowledge and am deeply grateful to the extensive research and assistance Emma Lehner provided me in preparing this article.

MANAGING THE CASELOAD

By David Brauer
Deputy Legal Defender

Lawyers in every practice are faced with the competing pressures of effectively representing all their clients while, at the same time, closing out cases in sufficient numbers to justify their employment. Nowhere are these pressures greater than for the public defender; ethical requirements are the same, but the volume of case assignments is far greater than most private practitioners. These pressures can sometimes lead to a sense of total chaos.

Because public defenders have no more time and energy than other lawyers, to be successful, they must find ways to get the job done with dispatch, always bearing in mind that effective representation can never be sacrificed for efficiency.

" I developed certain habits and routines to improve the quantity and quality of my work. I focused on separating the important from the unimportant, looked for easier ways to get the job done, and generally, tried to work smarter, not harder."

Although there are, no doubt, some available, I have never seen any materials explaining how to move cases in a high-volume practice to final disposition with maximum speed and effective representation. For better or worse, attorneys are usually left to work this out for themselves.

Over the course of time with the Public Defender's Office, I developed certain habits and routines to improve the quantity and quality of my work. I focused on separating the important from the unimportant, looked for easier ways to get the job done, and generally, tried to work smarter, not harder.

Here are a few ideas that you might try out to gain more control over your heavy caseload.

The Case File

Most public defenders have many files in various stages of development, from the preliminary hearing to sentencing. They contain the information that you need to get things done. But, if you don't arrange and maintain them in a consistent manner, you will have to hunt for what you want. This takes time, and since it is avoidable, it wastes time.

For cases in superior court headed for a plea or trial, try to arrange and maintain your files along these lines:

A. Affix all papers with an "Acco" fastener. This keeps things where you put them and is the first step in creating a sense of *control*. You will avoid the embarrassment of watching all of the papers in your file slide to the floor in court. This has happened.

B. Two documents usually referred to from time to time are the arraignment sheet and the Information or Indictment. Try putting the arraignment sheet on the bottom of the file and keep the charging document on top. You will know where to find each at once. This is especially handy in court when questions are raised about Rule 8 or the charge.

C. Keep the defendant's phone number and address (or jail location and booking number), the prosecutor's name and phone number, and any other needed names and phone numbers in the same place were they won't be covered up with any other materials. If you put this information on the top right-hand corner of the face of the file, you won't have to even open the file to get it.

(cont. on pg. 5) ☞

D. Keep the file in the simplest form. Throw away all duplicate minute entries, DRs, pleadings, and anything else not needed for your case. The thinner the file, the easier it is to manage.

E. Keep only necessary case log entries; keep them brief, to the point, and legible.

Keeping all case files in this or some other equally effective manner is only common sense – just as it is common sense to take the shortest route to the courthouse. It will save time, speed up your practice, and build confidence.

Case and Client Control

Unlike the private practitioner, the public defender has no concern for repeat business, referrals, or payment of fees. Thus, the public defender's client contact should cut to the quick with few social amenities. Most clients expect this.

All client contact should be friendly but, the client should never get the idea that you are his friend – and vice versa. Clients have been known to turn on their lawyers when their situations appear desperate. You must be professionally loyal but, remember that the client is not your friend and you should expect no sense of loyalty from him. Always be friendly but stick to business, and keep it at arms' length.

" Arguing with the client is always counterproductive; it attacks his ego and amounts to a waste of time."

Many clients try to assert control over their cases in any number of ways. These efforts, if not checked *ab initio*, can lead to troublesome client relationships as well as much wasted time and unfavorable case results. Most of these control problems can be avoided by making it clear, in a friendly but firm manner, during the initial interview that you are running the show.

In the event the client admits the crime to you, *that* is the time to casually but firmly state that, should the case be tried, you will not suborn perjury. Explain why. This tends to head off at the pass the sticky situation of a client tempted to lie under oath.

Sometimes a client will initially reject a plea offer that you are convinced is the best result he can get. Don't argue with him. Arguing with the client is always counterproductive; it attacks his ego and amounts to a waste of time. Instead, after pointing out all the pros and cons and your case evaluation, let him think about it for a while. If the plea is in his best interest, he usually realizes it before the offer expires.

Motion Practice

Motions should be written and filed only to the limits of effective representation.

By the very nature of the job, judges must pour through numerous motions, pre-sentence reports, and other materials daily. They tire of reading. They do not want to read some of what is forced upon them. Unnecessarily long motions invite reader resistance which results in ignoring and skipping over anything perceived to be irrelevant or immaterial to the issues. To the extent that this happens, you have not only invited a judicial scowl, you have also wasted your time and possibly failed to effectively convey the thrust of your argument.

Motions should be concise and to the point with a logical flow to the conclusion. Avoid hyperbole and verbiage. This is a discipline I have never mastered.

Dead Time in Court

Crowded morning calendars and tardy clients create a lot of waiting and loss of time. If judges would call all abbreviated matters first, those lawyers would soon be free to attend to other matters. However, judges do not usually do this. The court will sometimes take a long change of plea while three or four attorneys are waiting to simply file status reports, motions to continue, and so forth, leaving many of us to wonder if the bench is really seriously committed to "fast track."

In any event, to avoid countless hours of dead, unproductive time in court, take along other case files to work on while waiting for your turn.

When your turn does come, you cannot proceed without a client. Tell your clients that it is important for them to be in court *on time*. Be sure that they know what a bench warrant is, and that being only one minute late can cause their (your) case to be put at the bottom of the calendar. Tell them to be in court 15 minutes early.

Finally, to the extent that you can, try to get as many cases set for the same morning and, if possible, in the same division.

(cont. on pg. 6) ☞

Take the Initiative

Because of inertia, tradition, or other reasons, the prosecutor often does not take the initiative in moving a case to its ultimate result. The public defender should take the initiative to get the ball rolling – the sooner, the better.

After interviewing the client, studying the DRs, and performing any other tasks necessary to a solid evaluation of the case, the stage is set for a plea or trial preparation. If the client decides to seek a plea to a lesser charge, take the initiative to get this settled as soon as possible. If an agreement is struck, set up the change of plea at once, preferably at the same time you will be handling other cases in the court division. Don't let the case float along with resulting unnecessary court appearances and phone calls from clients and relatives.

If a plea bargain cannot be struck, you usually will have more time to prepare for trial.

Relationships with the Prosecutor

Because the prosecutor is your adversary, you should be wary of warm friendships which can lead to misunderstandings, hurt feelings, and a testy, uncommunicative atmosphere. A friendly, professional relationship is the best way to ensure the cooperation necessary to move a case to a trial, plea, or dismissal with the least resistance.

Conclusion

I have found the foregoing methods and ideas provide the best oil to move cases to desired results. They left me with the time needed for cases requiring trial, or cases with other thorny problems. There are, no doubt, different ideas in this regard, but these have worked for me. ■

WHAT EVERY TRIAL AND APPELLATE LAWYER SHOULD KNOW ABOUT THE ARIZONA STANDARD OF REVIEW ON APPEAL

By Garrett Simpson
Deputy Public Defender - Appeals

When 1998 rang in not so long ago the new year brought, with the usual resolutions to lose weight and quit smoking, changes to Rule 31, Arizona Rules of Criminal Procedure. These changes make Arizona appellate practice more akin to that in federal courts. One federally-inspired change, Rule 31.13(c)(1)(vi), requires Arizona briefs set out the "standard of review" to be applied by the appellate court to each issue, with citation to the relevant authority for that standard.

As we shall see, the predominate standard of review in Arizona appellate courts is "abuse of discretion." Working knowledge of this term of art is necessary for an appeals lawyer. But why should this ivory tower arcana ("I'll take "Famous Zlakets" for $1,000, Alex!") matter to trial attorneys? It matters because knowing the standard and how it is applied helps trial counsel and client put into perspective the folkloric notion that appeal courts routinely correct trial court mistakes. Many clients labor under the belief that the appellate court is a robust safety net against injudiciousness. It *is* a safety net of a sort, but its seine is so broad as to permit the camel and the needle and the rich Pharisee to all pass, side-by-side, without a bounce. A clear-eyed view of the cool reception historically given most appeals should inform the client and counsel to more soberly weigh the fateful decision to reject the deal and go to trial. Most appeals will be rejected unless the appellant can prove "abuse of discretion."

" So, what is 'abuse of discretion'? It is a standard for judicial review that neatly reverses the presumption of innocence."

So, what is "abuse of discretion"? It is a standard for judicial review that neatly reverses the presumption of innocence. It requires the citizen to prove on appeal, based solely on the trial record, not that a *better* ruling *should* have been made, but that the court's ruling was unsupportable, god-awful, prejudicial legal error. But it seems so subjective. Does a trial court, ". . .act within its discretion when it reaches a conclusion which pleases the appellate court, and abuses its discretion when the conclusion is one with which the appellate court

(cont. on pg. 7) ☞

disagrees"? Justice Feldman teaches school for us all in *Grant v. Arizona Pub. Serv. Co.*, 133 Ariz. 434, 455-456, 652 P.2d 507, 528-529 (1982) (Supplemental Opinion), where he explains (in the context of a motion for a new civil trial) the meat and potatoes of what could be seen as a vague, capricious standard:

> The reason for the broad discretion granted trial judges in these matters has been stated as follows:
>
> "The judge sees the witnesses, hears the testimony, and has a special perspective of the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record. For this reason he is accorded broad discretion in granting a new trial. . .
>
> Due to his unique position, *the trial judge has become the primary buffer against unjust verdicts*. He performs an indispensable function without which our system of justice could not hold out the promise of [a] uniform application of the law." *Taylor v. Southern Pacific Transportation Company*, 130 Ariz. at 521, 637 P.2d at 731 (quoting from *Reeves v. Markle*, 119 Ariz. 159, 163, 579 P.2d 1382, 1386 (1978))." [Emphasis added.]

" Yow! Red alert, trial lawyers! Justice Feldman concurs that your *trial judge* is the "primary buffer" against injustice, not the appellate court. Think about *that* the next time a client wants to reject a favorable plea agreement to preserve an issue for appeal."

Yow! Red alert, trial lawyers! Justice Feldman concurs that your *trial judge* is the "primary buffer" against injustice, not the appellate court. Think about *that* the next time a client wants to reject a favorable plea agreement to preserve an issue for appeal. What then is the appellate function? Justice Feldman continues:

> Our task (is) merely to determine whether that finding by an experienced trial judge was an abuse of discretion.
>
> The term 'abuse of discretion' is one which is often used by appellate courts but seldom defined. One possible definition is that a trial court acts within its discretion when it reaches a conclusion which pleases the appellate court, and abuses its discretion when the conclusion is one with which the appellate court disagrees. We consider this definition unsatisfactory. . . [T]hose factors which seem relevant for use by the appellate court in determining . . . whether there has been an abuse of discretion by the trial court, . . . [w]ith some additions . . . are:
>
> 1. Where there has been an error of law committed in the process of reaching the discretionary conclusion. See *Brown v. Beck*, 64 Ariz. 299, 169 P.2d 855 (1946).
>
> 2. Where the discretionary conclusion was reached without consideration of the evidence. *Knollmiller v. Welch*, 128 Ariz. 34, 623 P.2d 823 (App.1980).
>
> 3. Where other, substantial error of law has occurred as part of or in addition to the misconduct, we may conclude that the trial court abused its discretion. . . [see, e.g.] *County of Maricopa v. Maberry*, 555 F.2d 207 (9th Cir. 1977) (applying Arizona law); *Elledge v. Brand*, 102 Ariz. 338, 429 P.2d 450 (1967); *Sisk v. Ball*, 91 Ariz. 239, 371 P.2d 594 (1962).
>
> 4. Our review of the record may convince us that there is no substantial basis for the trial court's discretionary finding [see, e.g.] *Martin v. Rossi*, 18 Ariz. App. 212, 501 P.2d 53 (1972)."

So, knowing the ugly truth, trial lawyers can take plea agreements to their clients, and the clients in turn can make better-informed judgments whether to accept, keeping in mind the likely finality of trial court rulings.

As for the humble appellate lawyer who must now state the standard for each issue, here is an assorted *Standards of Review:*

(cont. on pg. 8) ☞

ABUSE OF DISCRETION: Apart from the *Grant* case, set out above, an abuse of discretion has been defined as "'an exercise of discretion which is manifestly unfair, exercised on untenable grounds or for untenable reasons,'" *State v. Woody*, 173 Ariz. 561, 563, 845 P.2d 487, 498 (App. 1992) quoting *Williams v. Williams*, 166 Ariz. 260, 265, 801 P.2d 495, 500 (App. 1990). An "abuse of discretion" is equated with a ruling that is "legally incorrect," *State v. Chapple*, 135 Ariz. 281, 297, n. 18, 660 P.2d 1208, 1223, n. 18 (1983). *See also Grant v. Arizona Pub. Serv. Co.*, 133 Ariz. 434, 455-457, 652 P.2d 507, 528-530 (1982) for a very good discussion of what constitutes an abuse of judicial discretion.

" Inadmissible statements volunteered by witness are reviewed for abuse of discretion to determine whether the court acted appropriately in crafting a remedy."

ADMISSION / EXCLUSION OF EVIDENCE: The trial court has considerable discretion in whether to admit evidence, *State v. Atwood*, 171 Ariz. 576, 638, 832 P.2d 593, 655 (1992), *cert. denied* 113 S.Ct. 1058 (1993). The standard of review is "abuse of discretion," *State v. Prince*, 160 Ariz. 268, 274, 772 P.2d 1121, 1127 (1989); *State v. Stuard*, 176 Ariz. 589, 863 P.2d 881 (1993); *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994).

CONFESSIONS: See *State v. Strayhand*, 184 Ariz. 571; 911 P.2d 577 (App. 1995). State has burden of proving confessions voluntary. *State v. Ross*, 180 Ariz. 598, 603, 886 P.2d 1354, 1359 (1994) and standard of review is for clear and manifest error, *State v. Atwood*, 171 Ariz. 576, 596, 832 P.2d 593, 613 (1992), cert. denied, 122 L. Ed. 2d 364 (1993).

CROSS-EXAMINATION: The conduct of cross-examination is reviewed for abuse of discretion, *State v. Smith*, 138 Ariz. 79, 673 P.2d 17 (1983).

COUNSEL, WAIVER OF. The applicable standard of review governing the issue of a defendant's waiver of counsel is not settled; however, it may be a mixed question of fact and law requiring *de novo* review, *State v. Cornell*, 179 Ariz. 314, 321, 878 P.2d 1352 (1994).

DISCOVERY VIOLATIONS: A trial judge's imposition of discovery sanctions under R.Cr.P. 15.7 is reviewed for abuse of discretion, *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996). To determine whether a trial judge has abused her discretion, the appellate court considers whether the trial judge's decision was "manifestly unreasonable" or based on "untenable grounds," *State v. Sandoval*, 175 Ariz. 343, 347, 857 P.2d 395, 399 (App. 1993). Discovery rulings are reviewed for abuse of discretion, *State v. Kevil*, 111 Ariz. 240, 527 P.2d 285 (1974).

DISMISSAL. Motions to dismiss are reviewed for abuse of discretion. *State v. Hansen*, 156 Ariz. 291, 751 P.2d 951 (1988).

EVIDENCE: On appeal the evidence is reviewed in the light most favorable to sustaining the verdict, and all reasonable inferences will be resolved against the appellant. *State v. Atwood*, 171 Ariz. 576, 596, 832 P.2d 593, 613 (1992), *cert. denied* 113 S.Ct. 1058 (1993). If substantial evidence exists to support a jury verdict, it will not be disturbed, *id.*

EXCITED UTTERANCE HEARSAY: The appellate court reviews a decision to admit hearsay evidence under the excited utterance exception [A.R.E. 803(2)] for clear abuse of discretion. *State v. Rivera*, 139 Ariz. 409, 410, 678 P.2d 1373, 1374 (1984).

EXPERT TESTIMONY: Admission of expert testimony will not be disturbed on appeal, absent a "clear abuse of discretion." *State v. Fiero*, 124 Ariz. 182, 187, 603 P.2d 74, 79 (1979). "[e]xpert opinion will not be rejected merely because it touches on an ultimate issue of possibly invading province of the jury." *Bliss v. Treece*, 134 Ariz. 516, 518, 658 P.2d 169, 171 (1983).

EXPERTS: Appeals court will not disturb a motion to appoint expert at state expense, absent abuse of discretion and a showing of substantial prejudice, *State v. Gonzales*, 181 Ariz. 502, 511, 892 P.2d 838, 847 (1995), *cert den.*, ___ U.S. ___, 116 S.Ct. 720 (1996); *State v. Hansen*, 156 Ariz. 291, 296, 751 P.2d 951, 956 (1988). See also, *State v. Mincey*, 141 Ariz. 425, 441, 687 P.2d 1180, 1196, cert. denied, 469 U.S. 1040, 105 S.Ct. 521 (1984).

FINDINGS OF FACT. The Arizona Supreme Court will not disturb a trial court's findings of fact unless they are clearly erroneous, but it will draw its own legal conclusions from the facts. *Schwichtenberg v. Arizona*, ___ Ariz. Adv. Rep. ___ (Dec. 24, 1997).

HABIT: Habit evidence is admissible, while character evidence is usually not. *State v. Spreitz*, ___ Ariz. Adv. Rep. ___, ___P. 2d ___ (September 11, 1997). The standard of review of habit evidence is that "absent a clear abuse of discretion", the appellate court will not "second-guess a trial court's ruling on the admissibility or relevance of evidence." State v. Rodriguez, 186 Ariz. 240, 250, 921 P.2d 643, 653 (1996) (citing Amaya-Ruiz, 166 Ariz. at 167, 800 P.2d at 1275).

(cont. on pg. 9) ☞

HARMLESS ERROR. The United States Supreme Court has the power to review the record *de novo* in order to determine an error's harmlessness. *Arizona v. Fulminante*, 499 U.S. 279, 295, 111 S. Ct. 1246,1257 (1991).

IDENTIFICATION. Identification rulings are reviewed for clear and manifest error, *State v. Bracy*, 145 Ariz. 520, 530, 703 P.2d 464, 474 (1986).

IN LIMINE. Appeal from motions in limine are reviewed for abuse of discretion, *State ex. rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266 (1982).

INADMISSIBLE STATEMENTS. Inadmissible statements volunteered by witness are reviewed for abuse of discretion to determine whether the court acted appropriately in crafting a remedy, *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983).

"Motions for new trial are not looked upon favorably and will only be granted with great caution."

JURORS, NUMBER OF: Whether a defendant required a jury of twelve is reviewed for fundamental error and cannot be reviewed for harmless error. *State v. Henley*, 141 Ariz. 465, 469, 687 P.2d 1200, 1224 (1984).

JURORS: In *State v. Arnett*, 119 Ariz. 38, 50 579 P.2d 542, 554 (1978); *see also*, *State v. Ortiz*, 131 Ariz 195, 200, 639 P.2d 1020, 1025 (1982), the Arizona Supreme Court held:

> Ordinarily, the matter of excusing jurors is committed to the sound discretion of the trial judge, and in the absence of a clear and prejudicial abuse of that discretion, his action will not be disturbed on appeal.

JURORS, STRIKE FOR CAUSE. Whether a trial court violates a defendant's Sixth Amendment right to a jury trial by excusing a juror for good cause and replacing that juror with an alternate is a question of law which is reviewed *de novo*. *Dyer v. Calderon*, No. 95-99002 (9th Cir. 1997).

JURY IMPARTIALITY. Rulings on jury impartiality are reviewed for abuse of discretion, see: *Herrell v. Sargeant, Judge of the Superior Court*, No. CV 97-0156-PR, ___ Ariz. Adv. Rep. ___, ___ Ariz. ___, ___ P.2d ___ (1997).

JURY INSTRUCTION: Appellate courts will not reverse a trial court's refusal to give an instruction absent a clear abuse of discretion. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). But see, *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997) holding the court reviews *de novo* whether the jury instructions properly state the law. And see also, *United States v. Sterner*, 23 F.3d 250, 252 (9th Cir. 1994).

JURY PANEL: On appeal, a challenge to an entire jury panel is reviewed for whether the trial court departed materially from the requirements of law in the selection process. *State v. Greenawalt*, 128 Ariz. 150, 167, 624 P.2d 828, 845 (1981); *State v. Reasoner*, 154 Ariz. 377, 383, 742 P.2d 1363, 1369 (App. 1987). The defendant must show either the jury was unlawfully empaneled or that the jurors could not be fair and impartial. HOWEVER, see *Mach v Stewart*, 129 F.3d 495 (9th Cir. 1997), holding failure to *voir dire* entire panel on prejudicial remarks of one member of the array constitutes reversible "structural error."

JUROR. Motions to strike jurors for cause are reviewed for abuse of discretion, *State v. Oliver*, 169 Ariz. 589, 592, 821 P.2d 250, 253 (App. 1991).

MISTRIAL. Motions for mistrial are reviewed for abuse of discretion, *State v. Ferguson*, 149 Ariz. 200, 717 P.2d 879 (1986). Ruling on a motion for mistrial will not be disturbed on appeal absent a "clear abuse of discretion." *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995). Good restatement.

NEW TRIAL: A "narrow" standard of review. Motions for new trial are not looked upon favorably and will only be granted with great caution. The trial judge's ruling will thus be reviewed for a "clear abuse of discretion," *State v. Lukezik*, 143 Ariz. 60, 63, 691 P.2d 1088 (1984).

PROBATION REVOCATION: In appeals from the revocation of probation, the standard of proof is preponderance of evidence, and the standard of review is abuse of discretion subject to the fundamental fairness requirements of due process. Probationers facing violation proceedings are entitled to due process of law consistent with the 14th Amendment, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *State v. Settle*, 20 Ariz. App. 283, 512 P.2d 46 (1973). Admission of evidence in probation hearings is subject to review for abuse of discretion, *State v. Settle*, 20 Ariz. App. 283, 287 (1973); *State v. Belcher*, 111 Ariz. 580, 535 P.2d 1297 (1975).

PROSECUTORIAL MISCONDUCT: Rulings on claims of prosecutorial misconduct are reviewed for abuse of discretion, *State v. Dumaine*, 162 Ariz. 392, 783 P.2d 1184 (1989). To require reversal the misconduct must be

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"so pronounced and persistent that it permeated the entire trial and probably affected the outcome," *State v. Bolton*, 182 Ariz. 290, 307, 896 P.2d 830, 847 (1995). The misconduct will cause reversal unless the appellate court finds that "beyond a reasonable doubt that counsel's statements did not affect the verdict," *State v. Leon*, ___ Ariz. ___, ___, 945 P.2d 1290, 1293 (1997).

RULE 20: Denials of Rule 20 motions for directed verdict of acquittal are reviewed in evidentiary light most favorable to the state, resolving all reasonable inferences against defendant. *State v. Clifton*, 134 Ariz. 345, 348, 656 P.2d 634, 637 (App. 1982).

SENTENCING REVIEW: Trial court has broad discretion in sentencing and a reviewing court will not find an abuse of discretion unless the sentencing is characterized by arbitrariness, capriciousness, or failure to conduct an adequate investigation into facts relevant to the sentencing. *State v. Blanton*, 173 Ariz. 517, 844 P.2d 1167 (App. 1993). *State v. Calderon*, 171 Ariz. 12, 827 P.2d 473 (App. 1990). The trial court is presumed to have considered all the relevant mitigating factors, *State v. Everhart*, 169 Ariz. 404, 819 P.2d 990 (App. 1991). Non-capital sentence must be "grossly disproportionate" to severity of crimes to violate the Eighth Amendment. *State v. Bartlett*, 171 Ariz. 302, 830 P.2d 823 (1992).

SENTENCE: The trial court's decision to impose the presumptive term is not error. *State v. Risco*, 147 Ariz. 607, 712 P.2d 454 (App. 1985); *State v. Ramos*, 133 Ariz. 4, 648 P. 2d 119 (1982). In Arizona, there is no review of a legal sentence that is lawfully imposed, *State v. Pike*, 133 Ariz. 178 (App. 1982).

SENTENCING ERRORS: *State v. Curry*, 931 P.2d 1133; 225 Ariz. Adv. Rep. 3 (App. 1996). Defendant failed to raise sentencing objections before or during sentencing, so review is only for fundamental error, *State v. Atwood*, 171 Ariz. 576, 629, 832 P.2d 593, 646 (1992), cert. denied, 506 U.S. 1084, 122 L. Ed. 2d 364, 113 S. Ct. 1058 (1993).

SEVER. Motions to sever are reviewed for abuse of discretion, *State v. Comer*, 165 Ariz. 413, 799 P.2d 333 (1990).

SPEEDY TRIAL. Speedy trial issues are reviewed for abuse of discretion, *State v. Spreitz*, CR 94-0454-AP (1997); *State v. Henry*, 176 Ariz. 569, 578, 863 P.2d 861, 870 (1993).

STANDING. Standing is a question of law reviewed *de novo*, *Barrus v. Sylvania*, 55 F.3d 468, 469 (9th Cir. 1995).

STATUTORY CONSTRUCTION. Trial court's interpretation of a statute is reviewed *de novo*, *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996); *United States v. DeLaCarte*, 113 F.3d 154, 155 (9th Cir. 1997).

STOPS & SEARCHES: *De novo* is standard of review for reasonableness of stops and searches not clearly erroneous, *Ornelas v United States*, ___ U.S. ___, (May 28, 1996). The factual findings of the trial court are reviewed for abuse of discretion, *State v. Peters*, 246 Ariz. Adv. Rep. 10, 11, 941 P.2d 228, 230 (1997).

SUFFICIENCY OF THE EVIDENCE: Convictions are reversed if there is an absence of probative evidence to support the verdict, *State v. Marchesano*, 162 Ariz. 308, 312, 783 P.2d 247, 251 (App. 1981) and in so reviewing, the evidence is examined in the light most favorable to sustaining the verdict, *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981).

"Whether there is sufficient evidence for a traffic stop is a mixed question of law and fact."

SUPPRESSION: The appellate court considers only the evidence presented to the trial court at the suppression hearing. *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996). The appellate court defers to the trial court's factual findings absent an abuse of discretion. *State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996). However, the reasonableness of the officer's actions is reviewed *de novo*. *Blackmore*, 186 Ariz. at 632, 925 P.2d at 1349.

SUPPRESS EVIDENCE: *State v. Sigro*, 182 Ariz. Adv. Rep. 3 (App. 1995). The defendant's Fourth Amendment claims arise as a result of the trial court's denial of his motion to suppress evidence. Appellate review of such a denial is for clear abuse of discretion. *State v. Atwood*, 171 Ariz. 576, 634, 832 P.2d 593, 651 (1992), cert. denied, 122 L. Ed. 2d 364, 113 S.Ct. 1058 (1993). However, the review of mixed questions of law and fact which implicate constitutional rights is *de novo*. *State v. Buccini*, 167 Ariz. 550, 556, 810 P.2d 178, 184, cert. denied, 116 L. Ed. 2d 53, 112 S.Ct. 79 (1991).

TRAFFIC STOP: Whether there is sufficient evidence for a traffic stop is a mixed question of law and fact, *State v. Gonzales-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996). Reviewing courts give deference to the trial court's findings of fact, including findings regarding

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officer credibility and the reasonableness of inferences that he drew, but the appeals court reviews *de novo* the ultimate legal determination, *id.* In so doing, the court will consider only evidence presented at the suppression hearing, *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996).

VAGUENESS. Whether a statute is void for vagueness is reviewed *de novo, United States v. Woodley*, 9 F.3d 774, 778 (9th Cir. 1993). *[This is not to be confused with the less well-known "vague for voidness" doctrine often sighted at large on the third floor -GWS].*

VENUE: Ruling on motion for change of venue is reviewed for abuse of discretion. *State v. Salazar*, 173 Ariz. 399, 406, 844 P.2d 566 (1992).

WAIVER OF COUNSEL. If made after the jury is empaneled, a request to waive counsel is untimely and is submitted to the trial court's discretion, *State v. DeNistor*, 143 Ariz. 407, 412-413, 694 P.2d 237, 242-243 (1985). It is reviewed for abuse of discretion.

WITHDRAWAL. Rulings on motion to withdraw are reviewed for abuse of discretion, *Okeani v. Superior Court*, 178 Ariz. 180, 181, 871 P.2d 727, 728 (App. 1993).

WITNESS AVAILABILITY. A ruling whether the state made sufficient efforts to secure a witness for trial before offering the witness's prior recorded testimony is reviewed for abuse of discretion. *State v. Edwards*, 136 Ariz. 177, 181, 665 P.2d 59, 63 (1983). ■

JOE SHAW: A Lifetime of Integrity and Dedication

By Jim Haas, Senior Deputy and
Ed McGee, Deputy Public Defender - Appeals

Each December, one of our attorneys is honored with the Joseph P. Shaw award. It is our "attorney of the year" award, recognizing the public defender who best exemplifies Joe Shaw's qualities of integrity, dedication, and hard work.

For more than twenty years, Joe Shaw was a fixture in the Maricopa County Public Defender's Office. Joe retired in 1995, at the age of 83. He still resides in Phoenix with his wife, Mary Ann.

Many attorneys and staff members have joined the office since Joe retired. Having never worked with Joe, they may well wonder who he is and why the office would dedicate this prestigious award to him. This article is an attempt to introduce Joe to those who never met him, and to celebrate Joe's remarkable life and career for those of us lucky enough to have known and worked with him.

To say the least, Joe's beginnings were very humble. He was born on September 8, 1912, in Chester, Pennsylvania. He was raised by a single mother, at a time when this was even more difficult than it is today.

"As a teenager, Joe began hanging around Bettis Airport, washing and moving airplanes when the owners would let him."

Joe and his mother moved to the Pittsburgh area when he was a young child. As a teenager, Joe began hanging around Bettis Airport, washing and moving airplanes when the owners would let him. In 1929, at the age of seventeen, Joe obtained a pilot's license. He then earned a commercial pilot's license by logging hundreds of hours flying tourists around the Pittsburgh area in a biplane at $5 a head.

Despite his underprivileged background, Joe somehow managed to begin college at the University of Mississippi in 1933. He became the captain and starting quarterback for the Ole Miss football team, and worked as a lifeguard. In 1935, he returned to Pittsburgh and attended Duquesne University, earning a B.S. degree in Economics and Accounting. He began studying law at the University of Pittsburgh in 1939. But his law school career was interrupted by the war.

From 1941 to 1943, Joe was a ground and flight instructor at Hawthorne Flight School in Orangeburg, South Carolina. He then was sent to Tucson to train pilots and to test airplanes. He test-piloted B-17, B-24, B-32, P-38, and P-51 planes. He also resumed his study of the law at the University of Arizona, earning his law degree, *cum laude*, in 1945.

From 1945 to 1960, Joe worked for General Dynamic's Convair Division as the company's Washington, D.C. representative. He became a high-powered lobbyist and a Washington VIP. He drew an annual salary of more than $50,000, quite a fortune at the time, and lived in a "palace" with seven fireplaces. He hobnobbed with the Washington elite. In fact, at one point, Joe spent five days locked up in a congressional committee room with Senator Lyndon Johnson, the Speaker of the House, the Secretary of the Air Force, the Chairman of the Joint Chiefs of Staff and the chief executive officers of North American Aviation, Lockheed,

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Convair and other contractors negotiating the future of the Atlas missile program.

In addition to everything else, Joe was a model. From 1946 to 1949, he was the featured model in several full-page ads in *Life* and *Look* magazines, plugging Stinson aircraft as the logical successor to the automobile for the upwardly mobile family. He gave up modeling when Convair sold Stinson in 1949.

But Joe ultimately found his life as a VIP to be "phony." In 1960, he resigned and moved to Phoenix, where he became a prosecutor in the Maricopa County Attorney's Office. In 1963, he prosecuted the Southwest Land and Cattle Company case, one of Arizona's most famous criminal cases. The trial before Judge Warren McCarthy took more than ten months, and Joe's adversaries were a virtual *Who's Who* of the most powerful and well-respected criminal defense attorneys in the state.

"[A]t one point, Joe spent five days locked up in a congressional committee room with Senator Lyndon Johnson, the Speaker of the House, the Secretary of the Air Force, the Chairman of the Joint Chiefs of Staff and the chief executive officers of North American Aviation, Lockheed, Convair and other contractors negotiating the future of the Atlas missile program."

In 1964, Joe left the County Attorney's Office to go into private practice with Phoenix attorney Marvin "Mike" Johnson, who was one of the state's foremost personal injury and criminal defense lawyers. The Johnson and Shaw Law Firm had an office on the fifth floor of the Luhr's Tower from 1964 to 1973. Joe worked relentlessly to build the practice, including an eighteen-month stretch in the beginning in which he did not take off a single day.

Joe went back to the County Attorney's Office in 1973. He was known as an intimidating, but fair, prosecutor. MCPD Appeals attorney Carol Carrigan recalls trying a burglary case against Joe in Judge Sandra O'Connor's court. Carol, a senior in law school trying the case as an intern under Rule 58(e), found Joe "awesome." "He sat at a bare table devoid of files or notes and with complete accuracy presented his case." When a police officer blurted out a comment on the defendant's exercise of his right to remain silent during Joe's direct examination, Joe agreed with Carol's motion for a mistrial, a result that clearly annoyed Judge O'Connor. The case was retried, and the client was acquitted. According to Carol, "[s]everal times after that, Judge O'Connor expressed the opinion that my client was guilty. Any other prosecutor would have taken advantage of the judge's attitude, but not Joe."

When County Attorney Moise Berger resigned midterm in 1975, two members of the Board of Supervisors wanted Joe to be County Attorney, and urged him to apply for the position. Joe declined, opting instead to take a job at the Public Defender's Office, then headed by Ross Lee. At the age of 62, after an extraordinary thirty-year legal career, Joe Shaw became a public defender.

Wherever he practiced, Joe was known for his dedication, integrity, professionalism, and ethics. According to Dick Mesh, who worked with Joe in the County Attorney's Office, Joe did more than practice law; he "revered" the law. He continually studied, and his advice was routinely sought out by other attorneys, many of whom regarded a conference with Joe as an indispensable part of their legal research.

Joe was a tireless worker who had to be pushed to take any vacation time. In fact, in 1977, Joe was induced to enter into a written contract with then-Public Defender, now-Judge J.D. Howe, in which Joe promised to take "a minimum of a one week vacation in Vancouver, British Columbia for the purpose of playing golf therein . . ." (Joe carried a seven handicap for more than forty years.)

Joe was also known for his generosity in dealing with the employees of the office. He routinely donated vacation time to employees who had exhausted their leave due to extended illness. From 1989 to 1991 alone, Joe donated 240 hours of his vacation time, with a value of more than $8,500. This donation provided more than 683 hours of leave time to the beneficiaries.

In 1994, when the county's fiscal crisis forced cuts in staff, and mandatory layoffs were imminent, Joe volunteered to be laid off to minimize the impact on the office. He then continued to work, without interruption. When the office was able to rehire him some six months later, Joe had worked more than 630 hours for the office, *pro bono*. His efforts spurred Presiding Criminal Judge Ronald Reinstein to send a memo to Public Defender Dean Trebesch, in which he remarked, "As he has been throughout his distinguished career, [Joe] is a credit to his profession and to your office. I wish that there were a hundred lawyers with his dedication and professionalism."

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For the last ten years or so of his tenure in the office, Joe handled the daily guilty-plea calendar, entering fifteen or so pleas each day in Superior Court that other attorneys negotiated at justice courts. Although he was supposedly working only part-time, Joe would routinely arrive in the office before 5:00 a.m. to prepare for his daily calendar, which ran from 8:30 to about noon. He would pour over each and every file, to make sure that he was prepared to offer meaningful advice to the clients, and assistance to the court. By the time court began, Joe was thoroughly familiar with each case and plea. This high standard of preparedness was the norm for Joe, who was noted for his ability to efficiently and effectively handle this calendar.

"In 1994, when the county's fiscal crisis forced cuts in staff, and mandatory layoffs were imminent, Joe volunteered to be laid off to minimize the impact on the office. He then continued to work, without interruption. When the office was able to rehire him some six months later, Joe had worked more than 630 hours for the office, *pro bono*."

Joe recently received an award from the State Bar of Arizona recognizing his 50 years of membership. He has also maintained membership in the United States Supreme Court, District of Columbia, and Michigan Bars, for more than 50 years.

And on December 21, 1995, the year of his retirement and the thirtieth anniversary of the Maricopa County Public Defender's Office, Joe received the first annual Joseph P. Shaw Award. ■

ARIZONA ADVANCED REPORTS

By Steve Collins
Deputy Public Defender - Appeals

Adrian S. v. Superior Court, 259 Ariz. Adv. Rep. 47 (CA 1, 12/23/97)

The notice to change a juvenile judge was timely filed after a second petition for delinquency had been filed. The juvenile had participated in a hearing on the first petition which was later dismissed. This did not waive the right to notice the judge.

Schwichtenberg v. Arizona Department of Corrections, 259 Ariz. Adv. Rep. 9 (SC, 12/24/97)

The Department of Corrections released Schwichtenberg after he completed his first sentence. This was a mistake because he was supposed to then begin serving a consecutive 5.25 year prison sentence. Ten years later he requested a complete discharge from his remaining sentence.

The Arizona Supreme Court held under the "installment theory" an inmate has the right to have his sentences served uninterrupted. As the sentences would have been completed by the time Schwichtenberg filed his petition, he was entitled to a complete discharge from the remaining sentence. He was under no duty to inform the Department of Corrections that he had been erroneously released.

State v. Alteri, 259 Ariz. Adv. Rep. 3 (SC, 12/23/97)

The police received an anonymous telephone call stating a man named Dominic, approximately 42 years-old, was driving a four-door, gray 1991 Buick Century, westbound on I-10 near Marana Road in Tucson. The caller stated the car had Idaho license plate number 2/C 96113 and that the driver had in his possession $1,000 in cash and 150 pounds of marijuana.

The police stopped and arrested the defendant on this information. The Arizona Supreme Court held the subsequent search was illegal. "Although an anonymous tip may, in some circumstances, be sufficient to support a stop, the tip must show sufficiently detailed circumstances to indicate that the informant came by his information in a reliable way."

> In this case, officers did not know the caller's identity, veracity or basis of knowledge. Moreover, the tip merely provided current information which could have been obtained by anyone who observed the defendant and knew or heard his first name. Nothing confirmed the bare allegation that the defendant was carrying contraband. Such corroboration of the tip, as was observed by the officers, was unrelated to any criminal activity.

What was important was the caller's ability to predict the defendant's future behavior because it would demonstrate inside information -- a special familiarity with the defendant's affairs. Here the tip contained no private information about the defendant, nor was there any prediction of future events. Thus, the tip was unreliable

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because there was no indication it came from a person privy to the defendant's affairs.

State v. Branham, 259 Ariz. Adv. Rep. 44 (CA 1, 12/23/97)

The defendant was stopped for speeding. When he was unable to produce his automobile registration, the police officer searched the vehicle for it. In the process, he discovered drugs. The search was held to be illegal.

"The failure to produce registration is not a criminal offense . . . Therefore, such failure, by itself, does not provide probable cause to believe that a car is stolen and does not permit the limited search conducted here."

State v. Henry, 259 Ariz. Adv. Rep. 41 (CA 1, 12/23/97)

Under the facts of this particular case, the Court of Appeals held that delay occasioned by the State's filing of a notice of change of judge, was excludable time under Arizona Criminal Procedure Rule 8. Therefore, it was found the defendant was not denied his speedy trial rights.

The prosecutor said he used a peremptory challenge to strike a Hispanic jury panelist, because she made no eye contact with the prosecutor but made eye contact with the defendant and defense counsel. There was no objective verification of this claim. However, it was held this subjective analysis was sufficient to satisfy the requirements of *Batson v. Kentucky.*

State v. Kelly, 259 Ariz. Adv. Rep. 82 (SC, 12/31/97)

A.R.S. § 13-604(M) provides: "Convictions for two or more offenses committed on the same occasion shall be counted as only one conviction for purposes of this section." Here the defendant's two prior convictions happened on the same date.

The defendant had a prior conviction for possession of marijuana and a prior conviction for possession of methamphetamine. It was held if the offenses were part of a single uninterrupted transaction, with a single objective, then the two offenses should be treated as a single transaction committed on the "same occasion."

State v. Rienhardt, 259 Ariz. Adv. Rep. 13 (SC, 12/24/97)

Prior to trial, the defendant's girlfriend entered a plea agreement providing for testimony against the defendant. The girlfriend testified at trial that the defendant had written her letters asking her to change her story. These letters were in the possession of her attorney.

Under Arizona Criminal Procedure Rule 15, the prosecutor has to disclose to all material in the possession of people under the prosecutor's control. It was held the girlfriend's attorney was not under the prosecutor's control.

A witness testified as to statements made on the telephone by the defendant. The caller did not identify himself and the witness had never heard the defendant's voice before. It was held the voice was properly authenticated as that of the defendant by the use of circumstantial evidence consistent with the conversation.

The death penalty aggravating factor under A.R.S. § 13-703(F)(2) previously required a prior conviction for a "crime of violence." Since 1993, this section has only required conviction for a "serious offense."

The defendant held the victim hostage while the victim's friend took $1,180 of the defendant's money to purchase drugs. When the "friend" did not return, the victim was murdered. It was held this did not support the aggravating circumstance of pecuniary gain because the killing signified the end of any expectation of any pecuniary gain.

State v. Trostle, 259 Ariz. Adv. Rep. 66 (SC, 12/24/97)

Extensive pretrial publicity did not justify a change of venue. Voir dire on the issue of publicity was adequate. The prosecutor used a peremptory jury challenge to remove a Hispanic jury panelist because he previously had been on a not guilty jury. The prosecutor used another challenge to strike a panelist because he was concerned he would not get paid if forced to serve on the jury. These strikes were not wholly subjective and therefore, did not violate *Batson v. Kentucky.*

It was prosecutorial misconduct in the opening statement to call the defendant a coward, liar, pervert, rapist and murderer. It was also prosecutorial misconduct to state in closing argument that only two individuals knew detailed information of the crime: "One is [the co-defendant] and the other is sitting right here at the table asking you not to hold him accountable through his lawyer." This was an impermissible comment on the defendant's Fifth Amendment right not to testify.

"Where there is a doubt whether the death sentence should be imposed, we will resolve that doubt in favor of a life sentence." Here the death penalty was reduced from the death penalty to a natural life. This was

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based on several mitigating factors, including the defendant's emotional state which was caused by the extreme child abuse that he had suffered. Two justices dissented on this finding.

State v. Whalen, 259 Ariz. Adv. Rep. 66 (CA 2, 12/24/97)

The defendant was stopped by a police officer for failure to display a license plate on his vehicle. The defendant stated he refused to have a license plate, driver's license, car insurance or registration because he was "a citizen of the Republic of Arizona." Before the trial date, the defendant started placing fraudulent liens upon property of the arresting officer, the three judges who presided over various aspects of the case, and other public officials.

A fraud charge was then filed. The defendant was granted his request to represent himself. However, he refused to cross the bar to the front of the court room because he felt if he did, it would waive his claim as to lack of jurisdiction. It was held he waived his right to self-representation and it was proper to have appointed counsel try the case.

In re William G., 259 Ariz. Adv. Rep. 48 (CA 1, 12/23/97)

The juvenile accidentally hit a parked car with a shopping cart he was "goofing off" with. A finding of juvenile delinquency was reversed because this conduct did not constitute reckless criminal behavior.

In re Franklin V., 260 Ariz. Adv. Rep. 7 (CA 1, 1/13/98)

Eight to ten juveniles were standing across from the Arizona State Fair when a police officer confronted them. Franklin used profanity to tell the officer he was not going to talk to him. As a result of this conduct, Franklin was found delinquent for committing disorderly conduct.

The adjudication was vacated because it was held that it was within his First Amendment rights. The officer had no legal reason to arrest or search Franklin, and no right to force him to talk. The profanity did not constitute "fighting words" and he was merely asserting his rights.

State v. Cramer, 260 Ariz. Adv. Rep. 5 (CA 1, 1/13/98)

The defendant pleaded guilty to aggravated DUI. The factual basis for the plea included his driver's license being revoked because of an earlier reckless driving conviction. After the DUI plea, the reckless driving conviction was reversed and the order revoking his license was automatically rescinded. The defendant then moved to withdraw from the DUI plea agreement.

The defendant argued the general principle that a void judgment is a nullity and all proceedings founded on the void judgment are themselves invalid. The Court of Appeals denied the motion to withdraw finding the revocation order was not void, but merely voidable. It was held there was a sufficient factual basis for the DUI because the license was revoked at the time of the plea.■

SELECTED 9TH CIRCUIT OPINIONS

By Louise Stark
Deputy Public Defender - Appeals

United States v. Bighead, 128 F.3d 1329 (9th Cir. 1997).

Appeal from federal conviction of sexual abuse of a minor, based on admission of expert testimony on characteristics in child sexual abuse victims. Defendant's daughter testified that he first fondled her when she was about 7, and progressed through other sexual acts until he forced her to have intercourse at around age 11, giving her money afterwards. This pattern continued until she refused at age 17. The daughter told two friends, one in sixth grade, and another when she was 16, who testified to the disclosures. She first told an adult about these crimes just before turning 18, blaming fear of her father and shame for the delay. Cross examination focused mostly on the delayed reporting. Tasha Boychuk was called as an exert witness in rebuttal, talking about the typical characteristics of "delayed reporting" and "script memory" in her own observations of over 1300 persons who claim they are victims of child abuse. The court held this is not scientific knowledge, but "specialized knowledge." Apparently the *Daubert* [509 U.S. 579] tests don't preclude such knowledge that falls short of scientific theory. The majority rebuts claims that the testimony usurped the jury function and was more prejudicial than probative. The "testimony had significant probative value, in that it rehabilitated (without vouching for) the victim's credibility after she was cross-examined about the ... delayed reporting and ...inconsistencies...."

The lengthy dissent points to the evidence of other areas of conflict between the victim and defendant, and motives that might have prompted the belated and somewhat contradicted accusations. Although years and many different acts of molestation were introduced, only two were the basis of charges, and only one resulted in conviction. Judge Noonan specifically links the

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relaxation of evidentiary rules for the purpose of successful prosecutions to the Salem, Massachusets witchcraft trials of the 17th century, using the Federal rules of evidence and *Daubert* as his support. He also cites a clinical professor of child psychology who has examined the type of people engaged in Boychuk's work, and their credentials, and finds a "remarkable bias toward belief in whatever stories the child victim tells them, their willingness to believe that children never lie...."

United States v. Perez, 129 F.3d 1340 (9th Cir. 1997)

Two defendants get a rehearing of their claims of error. After their convictions were affirmed, the Supreme Court decided *Bailey v. United States*, 116 S.Ct. 501 (1995) which required evidence of active employment of a firearm by defendant to prove "use" of the firearm. Proximity, accessibility, possession are not enough. Both were initially convicted of the federal crime, "using" a firearm during or in relation to a drug trafficking crime. Perez, who was seen to pick up a gun as the search warrant team entered, did not benefit from the refined definition of "use." Cruz, who had a gun lying next to him on the couch when arresting officers entered, could not stand convicted of "use" on these facts, and so that conviction is reversed.

Under the federal scheme, the sentence for this crime depends on the type of weapon used. The verdict form in Perez's trial recited that he could be found guilty, if the jury found he used one of three different weapons. The type of gun is an element of the offense, and failure to provide a special verdict form for the jury to reflect their finding as to which gun was not harmless error, so the conviction is reversed.

Neal v. Shimoda, 131 F.2d 818 (9th Cir. 1997)

Two inmates challenge application of a state law which mandates their participation in sex offender treatment as part of their parole requirements. Both committed their crimes before the legislation was enacted. The state created the Sexual Offender Treatment Program (SOTP or the Act) in 1992. This mandates identification of sex offenders in prison, and compels their participation in SOTP as part of parole eligibility. In particular the inmate must sign a "contract and consent to treat" form. This includes an admission that the inmate "committed the offense(s) charged against" him, and a promise to "take responsibility for [his] sexual behaviors."

Neal was charged with multiple counts of robbery, kidnaping, sexual assault, threatening and attempted murder. SOTP was enacted after his offenses, and before he pled guilty. Neal protested when he was classified as a sex offender, citing the dismissal of those charges, and refused to participate in treatment. The prison refused to remove his designation as a sex offender, but noted that it is a clinical, not judicial label. He was (or would have been) parole eligible in August 1996.

Martinez was convicted of attempted rape in 1984. He had priors for attempted and completed sexual assaults. Post conviction proceedings reduced his term so that he is parole eligible in November 1998. He claims that the sex offender label improperly affects his parole eligibility and prevents his transfer to a minimum security facility. He also refused to participate in SOTP.

Both brought a civil rights action against prison administrators claiming that the sex offender designation violated due process and was an *ex post facto* law as to them; that forcing them to admit guilt in SOTP violated their 5th amendment privilege against self incrimination and constituted cruel and unusual punishment in violation of the 8th Amendment.

The 5th amendment claim was rejected, as SOTP was not a criminal proceeding, and their statements couldn't be used in a future criminal proceeding because they were compelled. The 8th amendment claim is summarily rejected.

Their claims are ripe, even if they have not yet been denied parole, as it is guaranteed that they will not be eligible unless they comply with SOTP. But their claims are not valid, and SOTP does not violate the *Ex Post Facto* Clause, because it does not increase punishment, or re-define a crime to their disadvantage. It is also found not to be retrospective. Denying parole eligibility is not additional punishment, but is for the purpose of treatment. Denying parole contingent on treatment does not criminalize previously legal conduct.

The court relies on the recent case of *Kansas v. Hendricks*, 117 S.Ct. 2072 (1997) in which that state's Sexually Violent Predator Act, providing for involuntary civil commitment procedures for certain persons, was held constitutional although the state was targeting inmates nearing release from sentences imposed before it existed. It did not violate *ex post facto* protection, as the act does not fix criminal liability, doesn't require conviction of before a person may be committed, and doesn't punish, rather it treats.

The inmates' due process claim, that SOTP interfered with a protected liberty interest by denying parole without due process, fared better. Noting that a designation as a sex offender carried stigmatizing

(cont. on pg. 17) ☞

consequences, and that failure to participate in the "voluntary" SOTP treatment eliminated parole eligibility, this court requires that procedural protections of due process be implemented before, not after, the designation as a sex offender. At a minimum the inmate must be given notice of the reasons upon which the state intends to classify him as a sex offender. For Martinez, convicted of sex offense, simply noting that the classification was based on his convictions was sufficient. For Neal, whose sex offenses were dismissed, the prison had to give him an opportunity to formally challenge imposition of the label, therefore the designation is ordered removed, as is the pre-requirement of SOTP treatment before parole eligibility. This makes him automatically eligible for his past due parole that was held up due to the unconstitutional classification.

Calderon v. United States District Court (Beeler, real party), 128 F.3d 1283 (9th Cir. 1997)

Several months before the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA) Beeler's state appellate proceedings were exhausted. He requested appointment of counsel to pursue remedies in federal court, which was granted. Sometime before the deadline for filing his petition for *habeas corpus*, one of the two appointed attorneys withdrew. Although a second lawyer replaced him, the other of the originally appointed lawyers was extremely busy with other capital cases. In addition, a great deal of work already done was not longer useable. The district court granted their request to extend the deadline and toll the AEDPA one year deadline for filing. The government challenges this tolling. This court finds that the AEDPA one year statute of limitations can be equitably tolled for such reasons. [keywords braden, schryver, Neuhoff]

United States v. Otis, 127 F.3d 829 (9th Cir. 1997)

Defendant testified in his trial for conspiracy to distribute cocaine and conspiracy to launder money. He claimed that he was entitled to a duress instruction, based on his claim that he was forced to work for the Cali cartel because they believed he'd stolen their money, although he claimed it was lost to the police. To force his compliance, he testified, the cartel kidnaped his father in Columbia, and released him with the threat that he'd be free so long as defendant worked for them. During one trip back to Colombia they carried out that threat. This was sufficient "immediate threat" and "well grounded fear the threat would be carried out" with "no reasonable opportunity to escape the threatened harm." The trial court erred in refusing a duress instruction and the convictions were reversed.

Paradis v. Arave, 130 F.3d 385 (9th Cir. 1997)

Victims Palmer and Currier were seen leaving from Spokane, Wash for a camping trip in Idaho, driving a distinctive van. They checked into and out of a Spokane motel between 12:45 a.m. and dawn two days later. The motel was very near Defendant's home. That morning Paradis and two others were seen in a similar van ascending a mountain road in Idaho, and returning on foot 30 minutes later. The following morning the victims were found dead and their van was found off the road, with the female victim's, (Palmer), body slightly immersed in a creek. Paradis' defense was that the other two committed the murders in his home in Washington, without his presence. This would also have deprived the Idaho trial court of jurisdiction for Palmer's murder. Defendant was acquitted of Currier's death in Washington state court.

Paradis was convicted of Palmer's murder and sentenced to death. State and some federal post trial proceedings resulted in his conviction being affirmed, but the sentence commuted to life w/o parole. This is an appeal from the dismissal of his second petition for *habeas* in federal district court. The court finds that the state waived the exhaustion of state remedies requirement. This successive petition for *habeas* relief is not barred because Defendant could not have known of it before, among other reasons for being able to reach the merits.

During a codefendant's post trial proceedings it became necessary to reconstruct lost transcripts, and it was then that the prosecutor's notes were subpoenaed. These included notes of a conversation with the medical examiner. From there, Defendant acted promptly on discovering that the notes contradicted the trial testimony of the M.E. At trial the M.E. had testified that the murder of Palmer happened at the creek, based on findings in her lungs, body temperatures of both victims, and a tear in the labia for which there was no blood found. This torpedoed Paradis' claim that she was not killed at the creek, when he was with the other two men. This court finds that failure to turn the notes over was a Brady violation, affected the conduct of Paradis' defense, and that he made a colorable claim of actual innocence, among other legal findings. Although dismissal of other claims was upheld, this one was remanded to district court for appropriate proceedings, and given the testimony already recounted in this opinion, the district court better grant *habeas* and order a new trial.

United States v. Hockings, 129 F.3d 1069 (9th Cir. 1997)

Hockings was convicted of possessing and transporting "visual depictions" of child pornography and "matters which contain [such] visual depiction." At the time of the offense, the definition of "visual depiction"

(cont. on pg. 18) ☞

included undeveloped film and videotape, but did not mention information on computer disc. The definition was later amended to include "data stored on computer disk or by electronic means which is capable of conversion into a visual image." But at the time of the offenses the charged statutes criminalized "transportation by computer of visual depictions of [child pornography]." This court finds that the definition was not intended as an exhaustive list, excluding items not mentioned; and that the purpose of the law, to stop harm to children in production of the images, would be thwarted by interpreting to eliminate images stored on computer discs; and that the amendment merely clarified existing law, but did not indicate that the original definition excluded computer discs. The Court also rejects the claim that the statute was void for vagueness. ■

BULLETIN BOARD

New Attorneys

In addition to the six new attorneys mentioned in our January edition, two extra people have joined the February 9 new attorney training class:

Michael Burkhart is a 1997 graduate of Vanderbilt University School of Law. While in law school, he clerked for one semester at the District Attorney's Office and clerked for one summer at the Federal Public Defender's Office in Nashville. He expects to be sworn in within a matter of days and will join Group C at that time.

Faith Klepper graduated from ASU's College of Law in 1997 and was admitted to the Arizona Bar last October. During law school, she interned in Washington, D.C. for the Senate Committee on Indian Affairs, externed at the U.S. Attorney's Office and clerked for the Navajo Nation Supreme Court. Faith will be assigned to Group A.

Assignments

Ted Crew	Group D
Amy Mabius	Group C
Robert Precht	Group C
Damon Rossi	Group A
Derek Zazueta	Group C
Jeffrey Zick	Group A

Encore

Vernon Lorenz is returning to the office on March 4. After several months in private practice, he is rejoining Group C, where he worked for nearly four years prior to his recent departure. We are very happy to have Vernon back with us.

Brent Graham has been hired and will return to our office on April 13. He left this office in 1995 and moved to Colorado Springs, Colorado to work for the Colorado State Public Defender's Office. Brent was an attorney in this office in our trial and appellate divisions, from 1988 until 1995. Prior to 1988, Brent was in private practice in Colorado for almost three years. He is scheduled to go to Group D.

Attorney Moves/Changes

Gerald Gavin, Defender Attorney, will transfer from Group D to Group C effective March 30.

Katie McCormick, Defender Attorney, will depart from our office effective March 13. Katie began her career as an extern with the office and upon graduation from law school, joined Group A. She has accepted a position with the Securities Division of the Corporation Commission.

Liz Melamed has resigned effective February 27. Liz joined the office as a Defender Attorney for Group B in 1993. She will pursue her legal career with a private practice firm.

New Support Staff

Stacy Peterson, Legal Secretary, will join Group C on March 9. Stacy holds a B.S. in Social Sciences from Brigham Young University. Before joining our office she worked in client services for Corel WordPerfect.

Andrew Swierski began working in Client Services on February 9. Andrew previously worked with Initial Services from February 1996 until November 1997.

Support Staff Moves/Changes

Deborah Sparks, Legal Secretary for Group C, left the office effective February 20.

January 1998
Jury and Bench Trials

Group A

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
12/1-5	Parsons	Cole	Turoff	CR 97-06890 2 Cts.Agg. Assault/ F3D	Not Guilty 2 Cts. Agg Asslt. Guilty 2 Cts. Disorderly Conduct/ Class 6 non-dangerous	Jury
12/18-1/6	Tosto/Jones	Martin	Mroz	CR 97-09200 2 Cts. Sex Assault/ F2; Agg. Assault/ F3D; Kidnap/ F 2; Assault/ M1	Directed Verdict	Jury
12/18-1/4	Timmer/ Robinson	C. Lewis	Hudson	CR 97-00235 5 Cts. Agg. Assault/ F3D; POM/ F6; PODP/ F6	Guilty 2 Cts. Agg. Assault, dangerous; Not Guilty 3 Cts. Agg. Assault dangerous, POM and PODP	Jury
1/13-1/22	Tosto/ Robinson	Baca	Nannetti/ Thackery	CR 97-02488 5 Cts. Intercepting Oral Communications/ F5; Burglary/ F4; Poss. Of Interception Device/ F6; All alleged for sexual motivation with prior	Guilty 3 Cts. Inter. Oral Comm.; Not Guilty 2 Cts.; Guilty - Burglary; Guilty Poss. of Intercep. Device Found for Prupose of Sexual Motivation; Proved prior	Jury
1/21-1/22	Leal	Dunevant	Robinson	CR 97-09411 Burglary/ F4; Theft/ F6 w/ prior	Not Guilty-Burglary; Guilty-Theft	Jury

Group B

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
12/19-01/06	Brown, L.	Dunevant	Clarke & Brnovich, S.	CR 97-06128 Aggravated Assault/F3D	Directed Verdict	Jury
01/05-01/08	Landry/ Ames	Mangum	Eckhardt	CR 97-02297 2 Cts. Aggravated DUI/F4	Guilty on both counts.	Jury
01/07-01/13	Peterson/ Corbett	Wilkinson	Bustamante & Proudfit	CR 96-07523 Aggravated Assault/F3D	Not Guilty	Jury
01/13-01/15	Landry/ Ames	Skelly	Davis, J.	CR 95-00636 Burglary 2°/F3 - with two priors	Not Guilty -- Guilty of Lesser Included Attempted Burglary 2°/F4 & Residential Trespass/F6, with two priors	Jury
01/13-01/28	Grant/ Corbett	Sticht	Amato	CR 96-12846 3 Cts. Child Molesting/F2, DCAC	Guilty	Jury
01/14-01/15	Newhall	Wilkinson	Wilkes	CR 97-09769 Possession of Dangerous Drugs/F4 Possession of Drug Paraphernalia/F6	Not Guilty on both counts.	Jury

(cont. on pg. 20) ☞

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
01/14-01/21	Kamin/ Corbett	McDougall	Davidon, Alan	CR 97-09497 Ct. 1, Armed Robbery/F2D Ct. 2, Burglary 1°/F2D Ct. 3, Aggravated Assault/F3D	Ct. 1 - Not Guilty -- Guilty of Lesser Included Robbery/F4, Non-Dangerous Cts. 2 & 3 - Guilty	Jury
01/16-01/21	Kamin & Burns/ Corbett	Bolton	Eckhardt	CR 97-07962 2 Cts. Aggravated DUI/F4	Not Guilty on both counts -- Guilty of Lesser Included Misdemeanor DUI-both counts	Jury
01/22-01/26	Peterson	Dunevant	Gaertner	CR 97-05238 Possession of Marijuana/F6 Possession of Drug Paraphernalia/F6	Guilty - Possession of Marijuana Hung - Possession of Drug Paraphernalia	Jury
01/22-01/28	Brown, J.	Bolton	Fenzel	CR 97-12063 Burglary 3°/F3	Guilty	Jury

Group C

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty / guilty	Bench or Jury Trial
1/5-1/7	Silva & Nermyr	Aceto	Craig	CR 97-93812 1 Ct. Agg Aslt/ F4	Not Guilty	Jury
1/7-1/15	Bingham/ Beatty	Grounds	Vick	CR 97-92381 1 Ct. Manslaughter w/veh/ F2 1 Ct. Lv Scn Acdnt w/dth/ F5 1 Ct. Endang/ F6	Guilty of Mans. non-dangerous Guilty of Lv Scn w/dth Guilty of Endang. Dang.	Jury
1/12-1/14	Mackey	Aceto	Smyer	CR 97-92901 Agg Assault/ F3 Trespass/ F6	Not Guilty of Agg Aslt Guilty of Crim Dam	Jury
1/20-1/27	Moore	Grounds	Ginhold	CR 97-93233 Agg Dr Lq/Drg/Tx Sub/ F4	Guilty	Jury
1/20-1/30	Stein	Aceto	Fuller	CR 97-92643 Armed Robbery/ F2D	Guilty of Arm Robb, non-dangerous	Jury
1/26-1/28	Stinson	Hotham	Brenneman	CR 97-90837 Poss of Meth/ F4	Guilty	Jury
1/28- 2/4	Ramos & DuBiel/ Breen	Araneta	Kunkle	CR 97-93273 1 Drive-By Shooting/ F2 2 Misconduct w/Wpn/ F4 5 Endangerment/ F6	Guilty on Drive By Guilty on Mis w/wpn 3 Cts. Endang. reduced to Misdemeanor	Jury

(cont. on pg. 21) ☞

Group D

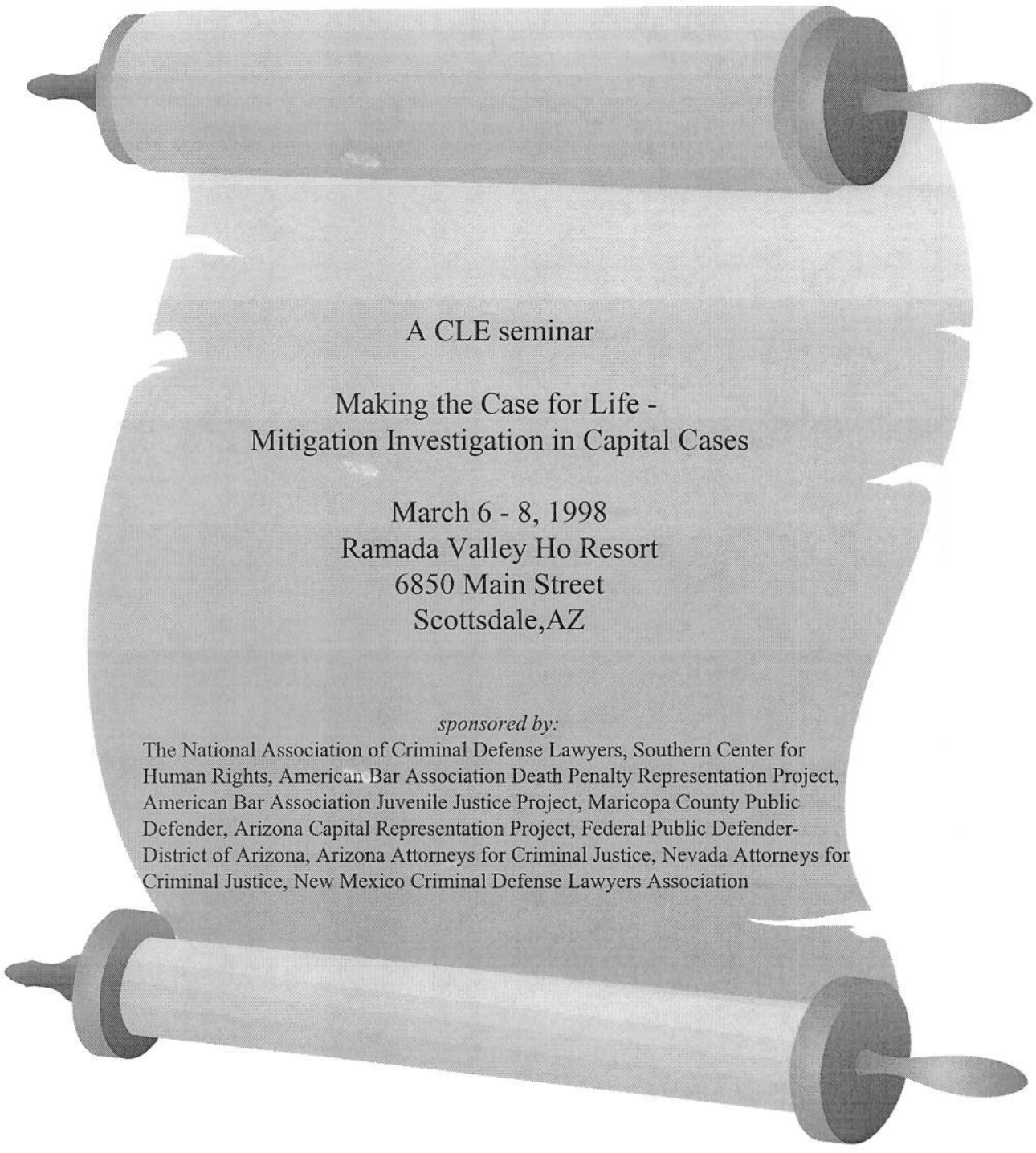
Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
1/7/-1/7/	Carrion	Kaufman	Moor	CR 97-02396 Agg DUI/ F4	Mistrial	Jury
1/8-1/12	Steiner	Dunevant	Hicks	CR 97-06100 Theft/ F3 Flt. From Purs Law Vehicle/ F5	Hung: Theft Guilty: Flight From Purs Law Vehicle	Jury
1/12-1/15	Schaffer	Kamin	Neal	CR 97-07085 Prohibitive Possessor/ F4	Guilty	Jury
l/12-1/15	Billar	Gerst	Morrison	CR 97-07416 Agg. DR-BA or GTR/ F4; Agg DR-LQ/Drg/TX SUB/ F4	Guilty	Jury
1/13-1/21	Brisson	D'Angelo	Myers	CR 97-02335 Possession of Crack for Sale/ F2 2 Ct. Misconduct Involving Weapons/ F4 POM/ F6	Hung Jury	Jury
1/2-1/30	Jung & Dichoso/ Fusselman	D'Angelo	Cappelini	CR 97-03953 Manslaughter w/veh./ F2	Not Guilty Manslaughter Guilty of Lesser Included Negligent Homicide	Jury

Office of the Legal Defender

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
1/14-1/21	Tate	Nastro	S.Tucker	CR 97-06904 Agg.Assault/ F3D	Not Guilty Agg. Asslt. Guilty Disorderly Conduct	Jury

Make Plans to Attend

Make Plans to Attend



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INSIDE ADDITION

The Insider's Monthly

February 1998

TRAINING NEWS

Ever have one of those days? It seems impossible to get everything done, and done correctly. You've exhausted all of your resources and it's only 10:00 am! To better serve staff members, and prepare them to meet the demands of their job, a training program has been developed. The purpose of the training program is to provide opportunities for all of the support staff to develop professionally, increase their skills, and to provide the resources necessary to perform their jobs more effectively and efficiently.

It is the training department's goal to provide each employee with a minimum of four hours of training per year. The time-frame would coincide with the fiscal year, July 1, to June 30 of the following year. Employees who are hired in mid-year would have their training time pro rated. Classes will vary in length depending on the content and purpose of the class. Employees will take one class from each of the required subject areas and one elective class per year. The required subject areas are dependent upon the employee's position. Supervisors will be provided with these lists and will oversee their staff's attendance. Attendance at any course will require a supervisor's approval.

Staff is encouraged to sign up for the classes they feel would be interesting and valuable to them in the workplace. There are a variety of classes offered in each of the subject categories, and employees should work with their supervisors in choosing which course to attend.

The classes are being offered by the County Organizational Planning and Training department, the Clerk of the Court, and the State Supreme Court. The classes are free of charge. In addition, classes will be offered in our training facility on a monthly basis. This is to insure that staff has the opportunity to attend classes without an attendance limit.

In addition, if an employee finds a class they would like to attend that is not on the current list, they may submit it for review. If the course qualifies for one of the subject categories, credit will be granted. These would include any outside seminars, training, or post-secondary classes.

Registration for classes will be processed by Lisa Kula, Training Administrator. After receiving supervisor approval, forward the registration form to Training. Confirmation will then be sent directly to the employee. The Training department will track classes and hours taken. More specific information will be forthcoming as class schedules firm up. If you have any questions, please contact Lisa Kula.

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COMMUNITY BOARD

No, the new attorneys aren't getting younger. Those fresh young faces you might have seen running around on January 27 were fifth grade students from Sandpiper Elementary School. The seventy students were participating in the "Courtroom Experience." Our office acted as one of the hosts for the program. The students met with attorneys Russ Born, Gary Kula, and Ed Glady for a tour of the court buildings, an explanation of the court system, and a mini "mock trial". They then returned to our training facility for further instruction and their lunch break.

The children found the experience exciting and eye-opening! Here are some excerpts (unedited) from the thank you notes they sent:

I liked when you took us to the empty courtroom and we got to play a part. And I really liked the elevators.

I really think it was nice of you to help us understand what was going on in the court! It was fun doing a trial of our own!

Thank you for taking us to the courthouse. I liked watch the juge and loyars take care of a case.

I really liked the part when you took us to see the trials about the girl who took drugs and the guy who got drunk.

What I thought was fun was where you had to go through the meddel ditector thing.

I was inpressed about the person that types in a word's that people say. I thank you for letting us go in the courtroom when it said No Children allow. I liked when we had a court who took the pen from Katie and asking question's about it. I was exiteded about how small the courtroom.

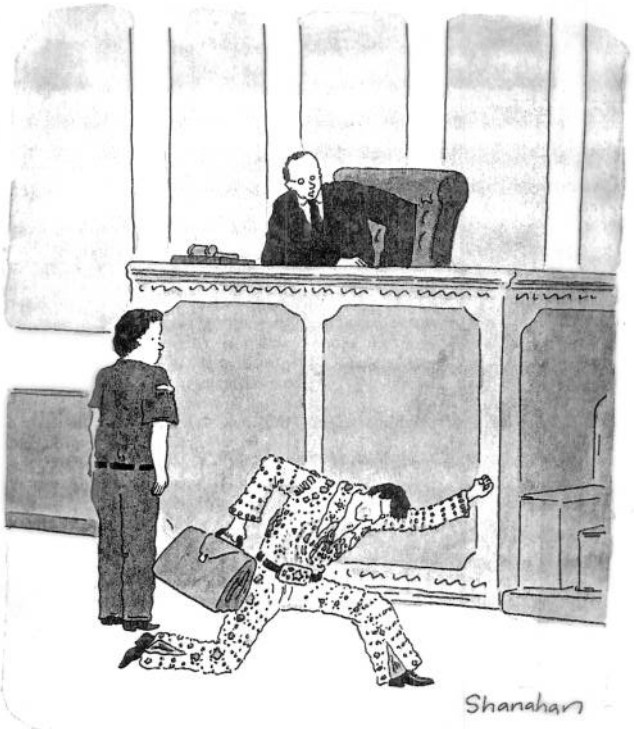
You did a great job by arresting Jessie and for teaching me that being a lawyer is not easy.

I liked the part when we pretended Ryan stole your black pen. I also liked the elevator.

Thank you for taking the time to show us how a real trial works. I had no idea how a T.V. trial could be different from a real trial.

THE LIGHTER SIDE

"It would help, Mr. Kramer, if your public defender were an attorney."



"A unique and stirring plea, counsellor."

- from *The New Yorker*